Nos. 98-405, 98-406

In The

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellant, and

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

**On Appeal From The United States District Court
For The District Of Columbia**

BRIEF OF APPELLEE ON REARGUMENT

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This brief is submitted pursuant to the Court's order of June 24, 1999, and addresses only those issues identified in the order without repeating the content of appellee's initial brief, which is hereby incorporated by reference.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

SUMMARY OF ARGUMENT

Section 5 and the Fifteenth Amendment are similar in that both prohibit procedures which purposefully abridge the right to vote on account of race. But abridgment, like dilution, is necessarily a relative term. To know whether one's vote (or group voting power) has been abridged, one needs to know what an unabridged vote would be.

In Fifteenth (or Fourteenth) Amendment cases, the procedure allegedly "abridging" minority votes is the existing system being challenged. Thus, abridgment is measured by comparing the existing system to an identified, available alternative that enhances minority voting strength. If there is no alternative that enhances minority voting power, the Court cannot remedy the alleged abridgment by replacing the *status quo* with the enhancing alternative.

In a Section 5 proceeding, however, the voting procedure allegedly abridging minority voting rights is not the *status quo*, but proposed, discrete changes to the *status quo*, and the remedy is to deny the proposed change from taking effect. Thus, abridgment is measured by a comparison of the existing system before it was changed to the system after the change takes effect. If the changed voting system does not abridge minority voting power compared to the *status quo*, the court cannot remedy the alleged abridgment. Section 5 cannot require the covered jurisdiction to adopt a maximizing alternative, but can only prevent the proposed change from taking effect. Accordingly, it would be purposeless or counterproductive to deny proposed voting changes equivalent to or better than the existing system, on the grounds that they do not go far enough in improving the existing system, since such a denial will simply restore the *status quo ante*.

The Court has always recognized this inherent limitation in Section 5 and, consequently, that abridgment under Section 5 is fundamentally different from the abridgment prohibited by the Fifteenth Amendment. The Court has repeatedly held that, while a government abridges voting rights under the Constitution if it intentionally provides less voting power than the available alternative, it abridges voting rights under Section 5

only if it provides less voting power than the existing system, regardless of whether it abridges voting power compared to the optimal alternative. The cases establishing this principle have directly involved the issue of whether the voting change actually abridged minority voting power – *i.e.*, had the "effect" of abridging – rather than whether the covered jurisdiction's purpose was to abridge minority power. But this is truly a distinction without a difference. The covered jurisdiction can have a "purpose" to abridge only if it is attempting to actually abridge, *i.e.*, if its intent is to reduce voting power relative to the *status quo*.

Nor is there any policy reason to stretch Section 5 to reach nonretrogressive changes motivated by a discriminatory purpose. Federal district courts can adjudicate these "discriminatory purpose" issues more even-handedly than a Justice Department devoted to a minority maximization policy, just as they expeditiously adjudicate redistricting litigation in every state not covered by Section 5. A redistricting plan in 2000 moreover, will have a proscribed retrogressive effect if it fails to maintain the same number of majority-minority districts that were created in the 1990s, when the Justice Department insisted upon Section 2 compliance and minority maximization. Accordingly, the "discriminatory purpose" standard will supplement the "nonretrogression" standard only in the extremely rare circumstances where the covered jurisdiction fails to *add* yet another majority-minority district to those created in the 1990s. If the Section 5 court refrains from adjudicating that rare discriminatory purpose issue, this does not suggest any "endorsement" of the alleged Fifteenth Amendment violation. Rather, it suggests only that the parties are seeking to adjudicate that constitutional issue in the wrong court, for it should be adjudicated, as the text of Section 5 itself contemplates, in the same district courts that adjudicate every other constitutional issue. Allowing adjudication of such constitutional issues in district courts would not alter the evidentiary standards for resolving those questions because, as the United States has already conceded in *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) ("*Bossier I*"), it has the burden to prove unconstitutional purpose in a Section 5 court, just as it would

in "any [constitutional] challenge" in district court. *Bossier I*, App. 69a (Stevens, J., dissenting in part and concurring in part).[1] Conversely, requiring a covered jurisdiction to, in essence, sue itself under the Constitution and disprove the validity of hypothetical alternatives invented by Justice Department lawyers would constitute a severe, constitutionally problematic, transfer of sovereign power from state governments to the federal bureaucracy.

ARGUMENT

I. SECTION 5'S STRUCTURE, PURPOSE, AND LANGUAGE DEMONSTRATE THAT IT DOES NOT REACH NONRETROGRESSIVE PURPOSE.

It is common ground that Section 5 prohibits selecting a new voting procedure for the purpose of reducing existing minority voting power. In such cases, voting power under the proposed change is intentionally "abridg[ed]" relative to the existing system. 42 U.S.C. § 1973c. In appellee's view, this standard differs from the Fifteenth Amendment's prohibition in one respect. The Fifteenth Amendment also prohibits selection of a voting procedure for the purpose of reducing minority voting rights compared to that which would be available under a hypothetical, proposed alternative. In such cases, voting rights have been "abridg[ed]" under the Fifteenth Amendment because of the failure to enhance minority strength to the level that would have existed absent racial considerations. Thus, while perpetuation of a discriminatory *status quo* for racial reasons violates the Constitution's prohibition of a racially discriminatory purpose, it does not violate Section 5's prohibition against a racially retrogressive purpose.

The sum total of appellants' contrary argument is that a voting change which intentionally perpetuates a discriminatory *status quo* necessarily constitutes an impermissible "purpose"

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[1] In this brief, citations are to the Appendix ("App.") filed with the jurisdictional statements in this appeal, to the United States' brief ("U.S. Br."), to the United States' and appellant-intervenors' reply briefs ("U.S. Reply Br."), ("A-I Reply Br."), and to the appellee's brief ("Initial Br.").

to "abridg[e]" under Section 5 because it violates the Fifteenth Amendment's prohibition of purposeful abridgment. U.S. Br. at 19-20. Although that position has a certain superficial appeal as a policy matter, the notion that Section 5 prohibits deliberate perpetuation of the *status quo* is fundamentally at odds with the limited structure, remedial scope and historical purpose of this unique statute, as this Court has repeatedly emphasized in a series of cases holding that the "purpose of § 5 was to prohibit *only* retrogressive changes." *City of Lockhart v. United States*, 460 U.S. 125, 134 n.10 (1983) (emphasis added). *See* Initial Br. at 17 n.13.

Specifically, appellants' attempt to analogize the abridgment prohibited by Section 5 to that prohibited by the Fifteenth Amendment ignores the fundamental difference between the purpose and scope of the two provisions. The Fifteenth Amendment is designed to displace an existing *status quo* because it is discriminatory, and thus abridgment is obviously not measured by reference to the *status quo* being attacked, but necessarily by reference to a hypothetical, alternative improvement that was rejected for racial reasons. By its very structure, however, Section 5 is necessarily designed to prohibit dilutive *changes* to the *status quo*, and thus abridgment is necessarily measured by reference to the *status quo* before it was changed. As this Court has already noted in *Bossier I*, appellants' procrustean effort to transport the abridgment concepts from litigation involving attacks on the *status quo* to the Section 5 context is impermissible because it incorrectly "shift[s] the focus of § 5 from nonretrogression to vote dilution, and . . . change[s] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." App. 37a-38a. Acceptance of appellants' view of Section 5 would render *Bossier I* and *Beer v. United States*, 425 U.S. 130 (1975), practical nullities – their limitation of "effect" to retrogression would be effectively swallowed by appellants' free-floating "purpose" inquiry.

First, and most obviously, Section 5 is simply incapable of remedying or otherwise invalidating a nonretrogressive, purposefully discriminatory change in voting. Section 5 "applies only to proposed *changes*" to the *status quo*, and its only

remedy is to *deny* the proposed change, thus restoring the *status quo ante*. *Beer*, 425 U.S. at 138 (emphasis added). Accordingly, in fundamental contrast to the Fifteenth Amendment, it is simply not designed or suited to prohibit or remedy voting changes which perpetuate (or ameliorate) the *status quo*, even if that *status quo* is itself discriminatory. To repeat the illustrative example used at oral argument, if a polling place is currently six blocks from a minority neighborhood and a covered jurisdiction proposes to move it five blocks from that neighborhood, but rejects a better alternative site four blocks away for purely racial reasons, Section 5 simply cannot remedy this nonretrogressive, purposefully discriminatory change. Rather, it can only deny the proposal to move the polling place five blocks from minority voters, thus returning the polling place to its originally inaccessible six block location. The same would be true of other proposed changes in voting procedures which affect the weight or casting of one's vote, such as switching from an at-large to a single-member scheme. In all such circumstances, as the Court recognized in *Beer*, any ameliorative change, even if not the optimal improvement, must pass Section 5 muster because denial of an ameliorative change has the perverse result of putting minorities in a worse position than they would be in if preclearance were granted. *Beer*, 425 U.S. at 141. As the Court confirmed in *Lockhart*, denying preclearance to a change which maintains, rather than enhances, the *status quo* is similarly purposeless since it does not in any way benefit minority voters and simply restores the allegedly discriminatory *status quo*. *Lockhart*, 460 U.S. at 134-35 & n.10.

Thus, because of this fundamental limitation inherent in Section 5 – it deals only with changes to the *status quo* and its only remedy is to restore the *status quo ante* – it cannot improve or eradicate a discriminatory *status quo*. That being so, it simply makes no sense to interpret Section 5 to invalidate the deliberate perpetuation (or less-than-complete amelioration) of the existing system. If the *status quo* is discriminatory, it accomplishes nothing to restore it by denying the change and, if the *status quo* is not discriminatory, any

perpetuation (or improvement) of that nondiscriminatory regime is also nondiscriminatory. If the underlying electoral system is itself infected with racially discriminatory animus, this underlying defect must be cured by a legal challenge to that *status quo* – *i.e.*, a Section 2 or Fifteenth Amendment challenge. Such fundamental alteration to the *status quo* cannot be accomplished by a statute that deals only with changes to parts of the existing system. This is particularly true since the unconstitutional vote dilution inquiry requires evaluation of the *entire* electoral and political process system, which is impossible to do when one is examining a discrete change to that underlying system. *See White v. Regester*, 412 U.S. 755, 766 (1973).

In short, the Fifteenth Amendment is designed to eradicate a discriminatory *status quo* while Section 5 is a purely reactive statute that cannot even consider an unchanged *status quo* or require adoption of enhancing alternatives. For this reason, the Fifteenth Amendment prohibits racially-motivated rejection of alternatives which enhance minority voting power above the *status quo*, but Section 5 does not. In other words, the "abridgment" proscribed by Section 5 is narrower than the "abridgment" proscribed by the Fifteenth Amendment for the same reason that the dilutive "effect" prohibited by Section 5 is narrower than the dilutive "result" prohibited by Section 2, even though "effect" and "result" are synonyms. The function of Section 2, like the Fifteenth Amendment, is to affirmatively uproot a discriminatory *status quo* and therefore necessarily measures vote abridgment and dilution in relation to an improvement to that *status quo*. But since Section 5 is intended to prohibit discriminatory changes to the *status quo*, it measures vote abridgment and dilution in relation to the existing system. *See Beer*, 425 U.S. at 141 (A nonretrogressive change "can hardly have the 'effect' of *diluting* or *abridging* the right to vote on account of race within the meaning of § 5.") (emphasis added).

Thus, in light of the fundamentally "different evils" at which they are addressed, and the fundamentally different scope of their remedial procedures, Section 5 is not and cannot be coextensive with the Constitution. *Bossier I*, App.

33a. Section 5 goes farther than the Constitution in prohibiting any regression from the *status quo*, while it does not go as far as the Constitution in prohibiting a failure to improve the *status quo*. Section 5 prohibits any act which has the "effect" of reducing extant minority voting rights, even if the reason for such reduction is entirely legitimate, while the Constitution will prohibit such a retrenchment only if it is motivated by an invidious purpose. Similarly, Section 5 covers only changes to the *status quo* in certain jurisdictions, while the Constitution reaches the unchanged *status quo* in all states. In addition, under either interpretation of Section 5's purpose prong, it goes farther than the Fifteenth Amendment because it puts the burden of proof on the covered jurisdiction and because it unequivocally reaches vote *dilution* mechanisms such as redistricting plans, while the Fifteenth Amendment was thought in 1982 to reach only direct restrictions on access to the ballot. Initial Br. at 26-27. Accordingly, it is clear that the Fifteenth Amendment and Section 5 cannot be coterminous and that an interpretation of Section 5 which reaches only retrogressive changes nonetheless goes as far as – indeed, farther than – the Fifteenth Amendment.

In addition, it is clear that the original purpose and understanding of Section 5, within the broad framework of the Voting Rights Act, was to prevent "backsliding" from the improvements to the discriminatory *status quo* that would be caused by the Act's other provisions. Congress recognized that Section 5 was inherently unequipped to affirmatively improve the existing electoral system. That task was to be accomplished by the suspension of poll taxes, discriminatory "tests and devices" and Section 2 lawsuits to eliminate other dilutive measures. 42 U.S.C. §§ 1973b, 1973h. In contrast, Section 5's "limited substantive goal" was simply ensuring that the fragile gains created by the ban on tests – "the principal method used to bar Negroes from the polls" – would not be undone by retrogressive changes in other voting procedures. *Bush v. Vera*, 517 U.S. 952, 982 (1996); *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966). As the Court noted in *South Carolina*, other voting procedures, besides tests and devices, could be modified by recalcitrant

southern jurisdictions to disenfranchise the black voters recently enfranchised through the "tests and devices" ban, thus "perpetuating" the very discriminatory system that the ban was designed to eradicate. *Id.* at 335. Thus, even though voting procedures other than tests and devices had not been found to be discriminatory by Congress (and often were not since they were designed for an electorate that had already excluded black voters through the tests and devices), covered jurisdictions could nonetheless be forced to preclear them since they could potentially be modified to accomplish the disenfranchisement previously done through literary tests and the like. As the Court put it, new voting rules could be devised "to evade the remedies for voting discrimination contained in the Act itself," *i.e.*, the ban on discriminatory tests and devices. *Id.* This in no way suggests, as the United States would have it, that maintenance of voting procedures *other than* the banned tests and devices would offend Section 5, since such maintenance could not "undo" or "defeat" the minor fragile gains caused by the Voting Rights Act and since, as noted, Section 5 could neither address nor remedy racially-motivated maintenance of the *status quo*. *Beer*, 425 U.S. at 140-41 (quoting H.R. Rep. No. 91-397, at 8 (1970); S. Rep. No. 94-295, at 19 (1975)).

That is why the Court has repeatedly emphasized that Section 5 is designed solely to "freeze election procedures."[2] Although such freezing cannot, by definition, improve an existing situation, it did prevent southern jurisdictions from imposing regressive changes that accomplished the same discrimination that had previously been accomplished by those devices prohibited by other parts of the Act. Consequently, the "purpose of § 5 has always been to ensure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities" from the *status quo*, but not to invalidate changes on the ground that they

[2] *Beer*, 425 U.S. at 140 (quoting H.R. Rep. No. 94-196, at 57-58 (1975)); *Miller v. Johnson*, 515 U.S. 900, 925-27 (1995); *Bossier I*, App. 35a.

failed to enhance the *status quo* for racial reasons. *Beer*, 425 U.S. at 141.[3]

Accordingly, the Court has repeatedly held that, under Section 5, "abridge" means "retrogress," *i.e.*, a voting change does not abridge the right to vote unless it renders minority voting more difficult or less valuable than it was previously. Initial Br. at 16-18. Thus, in *Lockhart*, the Court held that a jurisdiction's proposal to use at-large and numbered post-systems – two often-used dilutive devices – was "entitled to § 5 pre-clearance" "[s]ince the new plan did not increase the degree of discrimination against blacks." 460 U.S. at 134. This was so even though the "new plan may have remained discriminatory," and "[m]inorities are in the same position every year that they used to be in every other year." *Id.* at 134, 135.

Thus, *Lockhart* held that perpetuation of the potentially discriminatory *status quo* did not "have the effect of denying or abridging the right to vote on account of race. . . . " *Id.* at 136. Since a voting change cannot have the effect of abridging voting rights unless it causes retrogression, it inexorably follows that it cannot have the purpose of abridging voting rights unless it is intended to cause that retrogression.[4] Appellants are

[3] *See also Lockhart*, 460 U.S. at 134 n.10 ("[T]he purpose of § 5 was to prohibit only retrogressive changes."); *Beer*, 425 U.S. at 143 (White, J., dissenting) ("I cannot agree [with the Court] that § 5 . . . reaches only those changes in election procedures that are more burdensome to the complaining minority than pre-existing procedures."); *City of Richmond v. United States*, 422 U.S. 358, 388 (1975) (Brennan, J., dissenting) ("The fundamental objective of § 5 [is] the protection of *present* levels of voting effectiveness of the black population.") (emphasis in original); *Miller*, 515 U.S. at 926.

[4] The Justice Department's contrary conclusion in its Section 5 guidelines is entitled to no deference for the same reason that *Bossier I* gave no deference to the Department's position that preclearance may be denied for a Section 2 violation. The Department's Section 2 argument in *Bossier I* was premised on an interpretation of Section 5's language that was reasonable if one ignored Section 5's limited structure and purpose (*i.e.*, Section 5's "effect" is analogous to Section 2's "result"), and the argument was expressly supported by S. Rep. No. 417, at 12 n.31 (1982),

utterly unable to offer any explanation of how the word "abridge" dramatically shifts meaning within the same sentence, depending on whether it modifies "purpose" or "effect."[5] Thus, their interpretation of Section 5 is facially invalid because it is contrary to the plain statutory language and the Court's consistent interpretation of that language. Initial Br. at 16-18.

Appellants nevertheless argue that construing "abridge" to mean retrogression when modifying purpose, as it does when modifying effect, would impermissibly render Section 5's "purpose" prong "almost superfluous." U.S. Reply Br. at 8-9. This is neither true nor an argument in favor of construing Section 5 to reach nonretrogressive changes. In the first place, under the retrogressive purpose standard, Section 5's "purpose" prong would independently invalidate changes that are permitted under the retrogressive "effect" standard in the important annexation context. Under *City of Richmond v. United States*, 422 U.S. 358 (1975), an annexation which reduces the previous

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as well as, by the alleged policy against granting preclearance to voting procedures that unlawfully diluted minority voting strength under the *White v. Regester* standard. U.S. Br. in *Bossier I*, at 33-37. The Court nevertheless refused to grant deference to the Attorney General's guidelines because that interpretation of Section 5 (although reasonable in isolation) was inconsistent with the logic of the *Beer* retrogression principle and impermissibly shifted Section 5's focus from the limited retrogression issue to the broader question of whether a change unlawfully dilutes minority voting strength compared to a hypothetical alternative. *Bossier I*, App. 37a-38a. Here, the argument that "abridge" does not mean retrogression when it modifies "purpose" is even more directly at odds with the *Beer* retrogression principle and would also impermissibly expand the Section 5 inquiry to focus on abridgment relative to a hypothetical alternative, rather than to the existing system. *See also* Initial Br. at 31 n.24.

[5] The private appellants, although not the United States, note that "purpose" in Section 5 is phrased in the present tense, while "effect" is purportedly phrased in the future tense. A-I Reply Br. at 2. Understandably, after making that interesting linguistic observation, appellants make no attempt to explain how this "distinction" in any way affects or undermines the conclusion that because "abridge" means retrogression in modifying "effect," it must also mean retrogression in modifying "purpose."

black voting population, and thus has a retrogressive effect, is nevertheless permissible under Section 5 unless the purpose of the annexation is to cause such retrogression, rather than to further a legitimate goal. 422 U.S. at 375-78. Accordingly, a voting annexation which satisfies Section 5's "effect" prong would nevertheless violate the statute's "purpose" prong, thus establishing that a retrogressive purpose standard would have significance distinct from the prohibition on retrogressive effect.

More fundamentally, however, it is hardly surprising or anomalous that a statutory prohibition against an illicit purpose fails to significantly expand a corresponding prohibition against an impermissible effect. This is true of every civil rights law which reaches both purpose and effect – such as Section 2 and Title VII – and is inherent in the fact that a prohibition against effect is almost inevitably broader than a proscription against an intent to accomplish that effect. Most obviously, Section 2 prohibits both an unintentional dilutive effect ("result") and a purposeful dilutive effect. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986). That being so, Section 2's prohibition against a dilutive purpose is largely unnecessary and, indeed, only applies to the rare defendant who incompetently attempts to dilute minority voting strength but does not accomplish it. This simply reflects the fact that, as everyone in Congress understood in 1982, purpose follows effect and a prohibition against an impermissible effect is broader than a prohibition against purpose. S. Rep. No. 417, at 15-39 (1982). Interpreting Section 2 to prohibit both a discriminatory purpose and effect is therefore fully consistent with the statutory construction principle of avoiding unnecessary redundance if reasonable. In contrast, it is appellants who seek the anomalous rule – contrary to English usage, Section 2 and Title VII – that purpose is broader than, and does not follow, effect. It attributes to Congress the schizophrenic policy of affirmatively deciding to grant preclearance to voting changes that actually perpetuate the *status quo*, even if the system "remains discriminatory," but simultaneously requiring denial of preclearance simply because the covered jurisdiction intended precisely that effect. Since it must be presumed that the federal legislature is

minimally rational, however, it is clear that because Congress did not perceive the perpetuation of even a discriminatory *status quo* as an evil result forbidden by Section 5, it could not logically have perceived an intent to perpetuate the *status quo* as an evil purpose forbidden by Section 5. If the result is legitimate, it is difficult to understand why it becomes illegitimate simply because it is intended.

1. Although appellants cannot reconcile their interpretation with the plain language, "limited substantive goal," remedial structure or historical genesis of Section 5, they nevertheless insist that Section 5 simply must be so interpreted to avoid the unthinkable policy result of having the Attorney General place her stamp of approval on voting changes adopted for racial, and therefore unconstitutional, motives. *Bush*, 517 U.S. at 982; U.S. Br. at 20; U.S. Reply Br. at 4. Even if this Court were free to rewrite statutes to implement policy goals different from those that Congress embodied in the statute, appellants' "parade of horribles" has absolutely no relevance in the 1990s and thus their desired judicial revision of Section 5 is unsupported by even a coherent policy argument. *But see Brogan v. United States*, 522 U.S. 398, 408 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . . "). Contrary to appellants' anachronistic (and facially erroneous) hypotheticals,[6] interpreting Section 5 to reach only

[6] The United States asserts that, if "abridge" in Section 5 means retrogression from the existing system, then Section 5 would not prohibit towns like Tuskegee, Alabama from gerrymandering their municipal boundaries to exclude black voters, if the town had previously prohibited blacks from voting. U.S. Reply Br. at 4. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960). This is facially wrong for two reasons. First, regardless of whether "abridge" means retrogression or something more, Section 5 nevertheless prohibits any change for the purpose of "*denying* . . . the right to vote on account of race," 42 U.S.C. § 1973c, and any *Gomillion*-like exclusion of blacks from a municipality is precisely intended to create such a denial. Second, any complete denial of minorities' right to vote would, by definition, constitute a reduction of their " 'theretofore enjoyed voting rights,' " and would therefore be retrogressive. *Richmond*, 422 U.S. at 379 (quoting *Gomillion*, 364 U.S. at 347). While towns like Tuskegee, Alabama – the defendant in *Gomillion* – might have made it nearly impossible for blacks to vote in the 1960s, a voting change making it literally impossible would nonetheless be retrogressive. The United States' related assertion that an all-white jurisdiction could pass a law denying minorities the right to vote is patently erroneous for the same reason – any such law would be both a denial and retrogressive. The purpose of such a change would be to reduce minority voting rights relative to those which existed before the change, and thus would be retrogressive. The fact that the town making the change is all white does not exempt it from Section 5 or alter this retrogression analysis since, as discussed below, a jurisdiction may possess a retrogressive purpose with respect to future black voters, as well as to current black voters. *See infra* pp. 21-22; *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 (1987).

retrogressive changes cannot, in the 1990s, possibly result in either perpetuating a discriminatory *status quo* or any judicial tolerance of intentionally discriminatory voting changes. Rather, the only policy issue is whether such "discriminatory purpose" issues should be adjudicated by the traditional district courts that resolve such constitutional questions in every other context or, rather, by a limited-purpose District of Columbia court and/or an unreviewable Justice Department bureaucracy that has a track record of equating discriminatory purpose with any failure to maximize minority voting strength to the greatest extent possible. Initial Br. at 41-42.

First, changes which perpetuate the *status quo* are discriminatory only if the *status quo* being so extended is itself discriminatory. The *status quo* for any redistricting plan henceforth submitted for preclearance, however, is necessarily nondiscriminatory since the Justice Department (or the Section 5 court) has affirmatively found it to be free of both discriminatory purpose and effect at least two, and usually three, times in the 1970s, 80s and 90s. As this Court has noted, preclearance was forthcoming in the 1990s only if the Department found that it complied with the "results" standard of Section 2 and the jurisdiction created any reasonably possible majority-minority district. *Miller v. Johnson*, 515 U.S. 900, 912, 923-27 (1995); *Bush*, 517 U.S. at 902; *Shaw v. Hunt*, 517 U.S. 899,

912-13 (1996). Thus, in striking contrast to the 1970s, the retrogression benchmark in the 2000 redistricting cycle is set extraordinarily high. Simply maintaining that minority maximization *status quo* under a nonretrogression principle will not perpetuate any *discriminatory* redistricting plans. It will maintain, rather, a system which maximizes minority voting strength to the extent constitutionally permissible (and sometimes beyond what is permissible). It is extraordinarily implausible that a submitting jurisdiction, except in the rarest of cases, could avoid retrogressing from the race-conscious redistricting required in the 1990s and still unconstitutionally dilute minority voting strength. The discriminatory purpose inquiry will add to the nonretrogression principle, and come into play, only in those rare cases where the covered jurisdiction has failed to add yet another majority-minority district to those existing in the 1990s, and the Justice Department alleges that this failure is motivated by racial animus.

In light of this, there is simply no reason to stretch Section 5's jurisdiction and substantive standard in order to adjudicate these rare hypotheticals. First, the traditional district courts are better situated to conduct the "intensely local appraisal" required for analyzing the racial purpose of voting plans and, as discussed below, the United States will have the burden to establish discriminatory purpose in either those district courts or the Section 5 court. *White v. Regester*, 412 U.S. at 769-70; *see infra* p. 25. Conversely, preclearing such redistricting plans in no way endorses any potential Fifteenth Amendment violation, any more than preclearance endorses a voting change that violates Section 2 or the First Amendment. (Indeed, under appellants' theory, Section 5 courts must adjudicate the redistricting plan's compliance with the *Fourteenth* Amendment's one-person one-vote principle and *Shaw's* racial neutrality requirement to avoid "endorsing" such constitutional violations.) But this Court did not give a seal of approval to the voting changes in *Lockhart* when it held that the new at-large and numbered-post systems were "entitled to § 5 preclearance," even though such devices often were used to intentionally dilute minority voting strength and the electoral

system "remained discriminatory." 460 U.S. at 134. Preclearance simply reflects the fact that *Section 5* objections are not appropriate for changes that satisfy *Section 5*, because the District of Columbia Court and the Attorney General have no jurisdiction to resolve whether the proposed change violates other constitutional or federal voting rights guarantees.[7] The fact that the United States Court of Federal Claims (the other special, limited-purpose court in the District of Columbia) cannot adjudicate due process violations hardly "endorses" such unconstitutional deprivations of property. *See South Carolina*, 383 U.S. at 331-32 (comparing Section 5 courts to Claims Court). *See, e.g., LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995). It simply recognizes that the Court of Federal Claims has no jurisdiction over, and has no power to remedy, such violations, just as the District of Columbia Section 5 court is without jurisdiction and the power to remedy a nonretrogressive Fifteenth Amendment violation.

Indeed, as this Court has noted, Section 5 itself expressly contemplates that such constitutional issues will be adjudicated in " 'traditional suits attacking [the voting procedure's] constitutionality' " in a " 'subsequent action to enjoin enforcement.' " *Shaw v. Reno*, 509 U.S. 630, 654 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 549-50 (1969)). If unconstitutional discriminatory purpose is to be adjudicated in *both* the Section 5 and subsequent district court litigation, this creates the distinct possibility of duplicative litigation and inconsistent judgments. Initial Br. at 36.

In addition, while interpreting Section 5 pursuant to its plain language will not in any way permit a constitutional violation to be unremedied, expanding the Justice Department's Section 5 jurisdiction to encompass "discriminatory purpose" will encourage or coerce covered jurisdictions to *commit* constitutional violations. As this Court has recognized,

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[7] Interpreting the jurisdiction of Section 5 courts to extend only to Section 5 issues is particularly appropriate because the Court has "long held that congressional enactments providing for the convening of three-judge courts must be strictly construed." *Allen v. State Bd. of Elections*, 393 U.S. 544, 561 (1969).

if the covered jurisdiction fails to "subordinate traditional [re]districting principles" to create a majority-minority district hypothesized by Justice Department lawyers, the Department will find "a discriminatory purpose," but if it acquiesces to the Department's coerced racial gerrymander, it will violate the rights of nonminorities under *Shaw*. *Bush*, 517 U.S. at 979; Initial Br. at 42. Placing covered jurisdictions in the position of satisfying such inconsistent demands greatly exacerbates the already "substantial federalism costs" of Section 5 and will lead yet again to another unending cycle of redistricting litigation of the sort that bedeviled such jurisdictions during the 1990s. *Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999) (internal quotations omitted). In short, while there is no realistic fear that meritorious discriminatory purpose claims will go unremedied if Section 5 is given a properly limited construction, there is a very real chance that, under appellants' expansive view, discriminatory purpose will be erroneously found by the Justice Department and the fear of such a finding will force covered jurisdictions to violate the constitutional rights of nonminorities.

For all these reasons, appellants' proposed interpretation stretches Section 5 far beyond its intended scope and works a major, and constitutionally suspect, intrusion on State sovereignty that, at a minimum, should not be inferred absent the clearest possible direction from Congress. While covered jurisdictions have a unique procedural burden under either interpretation of Section 5, the retrogression principle at least is a focused substantive inquiry and gives some deference to the State's policies concerning its electoral and political processes. Under the retrogression principle, the State is essentially prohibited from departing from its prior electoral practices in a manner which disadvantages minority voters – thus "freezing" the State's prior choices on how to organize its system of self-governance. While this is a serious intrusion on State sovereignty, it at least defers to the State's *own* prior policy choices concerning voting and elective office. No federal court or bureaucrat *imposes* on the State a "nondiscriminatory benchmark" practice – "because in a § 5 case the question of an alternative benchmark never arises – the benchmark is

simply the former practice employed by the jurisdiction seeking approval of a change." *Holder v. Hall*, 512 U.S. 874, 888 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Under appellants' free-floating "purpose" inquiry, in contrast, Justice Department lawyers or Section 5 "courts must *choose* an objectively reasonable alternative practice as a benchmark for the [dilutive purpose] comparison." *Id.* at 887 (emphasis added). The covered jurisdiction thus has the burden of demonstrating the objective, race-neutral superiority of its change over the myriad alternative possibilities that Justice Department lawyers proffer as preferred alternatives that the State "should have" chosen. This "wide range of possibilities makes the choice inherently standardless" and subject to unending manipulation by the Justice Department bureaucracy – particularly with respect to choices such as which of a multitude of possible redistricting plans is the "best" one. *Id.* at 885 (opinion of Kennedy, J.) (quoting opinion of O'Connor, J., concurring in part and concurring in judgment).

As this Court has recently noted in an analogous (albeit far less intrusive) context, "[w]hen the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden v. Maine*, No. 98-436, 1999 U.S. LEXIS 4374, at *78 (U.S. June 23, 1999). Thus, at some point, investing federal courts and government lawyers with such standardless power impermissibly intrudes on the "essential sovereignty of the States" that is guaranteed by our "constitutional system." *Id.* at *76. *See also Miller*, 515 U.S. at 927. At an absolute minimum, the Court should not adopt an interpretation of Section 5 which so dramatically "alter[s] the usual constitutional balance between the States and the Federal Government," unless Congress has made "its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotations omitted). *Gregory v. Ashcroft*, 501 U.S. 452, 460, 470 (1991).

2. Not only do this Court's precedents not require interpreting Section 5 to reach nonretrogressive purpose, they strongly support the opposite result. The logic of both *Beer* and

Bossier I all but compel the conclusion that Section 5's "purpose," like Section 5's "effect," reaches only retrogression. Any other reading raises all the concerns that animated the Court in *Beer* and *Bossier I* and renders both of those decisions devoid of practical significance.

Notwithstanding this, appellants seem to make the extraordinary suggestion that *Beer*, the seminal case establishing that the "purpose of § 5 was to prohibit only retrogressive changes" which reduced the *status quo*, actually ruled that the "purpose" prong of Section 5 also prohibited nonretrogressive changes if they are intended to maintain the *status quo*. *Lockhart*, 460 U.S. at 134 n.10 (citing *Beer*, 425 U.S. at 141); U.S. Reply Br. at 7. But, of course, *Beer* did not in any way interpret the "purpose" provision of Section 5 or suggest that it had a different reach than the "effect" prong – and no one, including the United States, has ever so interpreted that opinion. As the United States elsewhere recognizes, the "purpose" provision of Section 5 was not at issue in *Beer*, and *Beer* never mentions it, much less suggests that it has an entirely different meaning than the retrogressive "effect" standard. U.S. Br. at 29; *Beer*, 425 U.S. at 139.

To be sure, as both the majority and dissenting opinions in *Bossier I* recognized, *Beer* noted that a change which satisfies Section 5's nonretrogression standard could "nonetheless continue so to discriminate on the basis of race or color as to be *unconstitutional*." *Beer*, 425 U.S. at 142 n.14 (emphasis added). No one has interpreted this language to suggest that *Section 5* prohibits nonretrogressive changes, but only to suggest, at most, that a change which satisfies the less demanding standard of Section 5 may nonetheless violate the more demanding constitutional standard. *See, e.g., Bossier I*, App. 71a (Stevens, J., dissenting in part and concurring in part); App. 38a-39a. This, of course, *supports* our assertion that while the Constitution reaches nonretrogressive discriminatory voting procedures, Section 5 does not. Appellants nevertheless seem to suggest that Section 5 *incorporates* the Constitution's substantive prohibition against nonretrogressive discriminatory changes, on the basis of the following passage from *Beer*: "[A]n ameliorative plan 'cannot violate § 5 *unless* [it] so discriminates on the basis of race or color as to violate the Constitution.' " U.S. Reply Br. at 8 (quoting *Beer*, 425 U.S. at 141) (emphasis added by U.S. Brief). This excerpt, however, in no way suggests that Section 5 and the Constitution are coterminous but, rather, merely confirms again that the Constitution is a different, more demanding standard than Section 5.[8]

We fully agree that a jurisdiction cannot violate Section 5 "*unless*" it violates the Constitution, because a constitutional violation is a necessary, albeit not sufficient, basis for establishing a Section 5 purpose violation. A jurisdiction cannot violate the Constitution *unless* it violates Section 2, because Section 2 is a different, more demanding standard than the Constitution. This does not mean that a government violates the Constitution *if* it violates Section 2 or that the Constitution and Section 2 are coextensive. By the same token, the *Beer* excerpt does not suggest that a jurisdiction violates Section 5 if it violates the Constitution, but only that the more demanding standard in the Constitution is a necessary prerequisite to establishing a Section 5 violation, just as a Section 2 violation

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[8] This sentence in *Beer* has never been construed as suggesting that the "purpose" prohibited by Section 5 is the same as an unconstitutional purpose. To the contrary, the *Bossier I* dissenting opinion argued that this same passage from *Beer* suggested Section 5 preclearance could be denied for changes which clearly "violated some *other* federal law," including not just violations of the "Constitution," but also laws, like amended Section 2, that incorporated the "standard established in *White v. Regester*." *Bossier I*, App. 70a-72a (Stevens, J., dissenting in part and concurring in part) (emphasis added). The relevant point here is that the dissenting opinion, like the majority opinion, recognized that any denial of preclearance to a nonretrogressive change was premised not on a Section 5 violation, but on a violation of an exogenous command contained in Section 2 or the Constitution. The 1982 legislative history similarly interpreted *Beer* to authorize a preclearance denial for a *constitutional* violation, and also thought that Section 2 could supply an additional, exogenous ground for denying preclearance. S. Rep. No. 417, at 12 n.31 (1982). But, again, nothing in the legislative history suggests any belief that *Beer* had interpreted the *Section 5* "purpose" standard to reach nonretrogressive changes or to incorporate the Constitution's purpose standard.

is a threshold requirement to even allege a potential constitutional violation. As we explained at length in our prior brief, the Court in *Shaw v. Reno* subsequently eliminated any ambiguity on this point. There, the Court interpreted the *Beer* dictum to simply suggest "that a reapportionment plan that satisfies Section 5 still may be enjoined as unconstitutional" and further clarified that any such constitutional violation must be established in a "subsequent action to enjoin enforcement," rather than the Section 5 proceeding itself. 509 U.S. at 654 (internal quotations omitted); Initial Br. at 35. The subsequent action is required because, as we previously explained, the Section 5 court simply has no jurisdiction over constitutional claims (or any claim other than Section 5) and Section 5 expressly contemplates such a subsequent constitutional challenge. *See supra* p. 16; Initial Br. at 36.

Similarly, the Court's decision in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), never mentioned, and did not implicate, the issue of whether Section 5 reached only a discriminatory retrogressive purpose or also reached a discriminatory nonretrogressive purpose. Rather, it simply held that future black voters, as well as current black voters, were protected against the retrogressive discriminatory purpose that *Richmond* had made clear violated Section 5. If any of the thirty-two black residents of Pleasant Grove had registered to vote before its discriminatory annexations, there is no question that those annexations of white-occupied land would be a straightforward violation of the retrogression standard since the black voting percentage after the change would have been less than that existing before the change. The *Pleasant Grove* majority simply held that this result was not altered because none had registered or because new black voters entered after the time of the annexation. 479 U.S. at 465 n.2. If a covered jurisdiction severely reduced polling place hours the day after a black voter moved into town, this plainly has the retrogressive purpose of denying the voting rights the black voter enjoyed before the change. *Pleasant Grove* correctly held that the retrogressive purpose prong also prohibits a jurisdiction from so reducing voting hours the day *before* a black voter is expected to move in. This holding in no way suggests that

Section 5 reaches a nonretrogressive purpose, or that Section 5's "purpose" is broader than "effect," and any such suggestion is contradicted by the Court's explicit finding that Section 5 purpose *follows* effect. Initial Br. at 29.[9]

II. THE UNITED STATES BEARS THE BURDEN OF PROVING THAT A COVERED JURISDICTION HAS A NONRETROGRESSIVE DISCRIMINATORY PURPOSE.

As noted, the only identified or conceivable basis for contending that preclearance can be denied to a nonretrogressive change is that Section 5 incorporates the constitutional standard or that a constitutional violation forms a discrete basis for denying preclearance. *See, e.g., Bossier I*, App. 61a (Breyer, J., concurring in part and concurring in the judgment) ("Section 5 prohibits a covered state from making changes in its voting practices and procedures where those changes have

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[9] The court's summary affirmance in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983), just one month before the *Lockhart* decision, plainly did not resolve the question that the Court in *Bossier I* left open for resolution. This Court has repeatedly made clear that "[s]ummary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *See also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). Of course, interpreting the *Busbee* affirmance as holding that Section 5 reaches nonretrogressive changes would surely break new ground by expanding – indeed, contradicting – the holdings in *Beer* and *Lockhart* that Section 5 reached only retrogressive changes. There was certainly no established principle that Section 5 reached nonretrogressive changes when *Busbee* was affirmed. Moreover, summary affirmance does not endorse the reasoning of the court below and since the Georgia redistricting at issue in *Busbee* could be viewed as retrogressive, affirming the judgment in that case is not necessarily premised on the view that Section 5 reaches nonretrogressive changes. *See, e.g., Bush*, 517 U.S. at 996 (Kennedy, J., concurring) ("[O]ur summary affirmance in *DeWitt*, stands for no proposition other than that the districts reviewed there were constitutional."). *See* Initial Br. at 30 n.23.

the *unconstitutional* 'purpose' of unconstitutionally diluting minority voting strength" (emphasis in original)); *id.* at 71a-72a (Stevens, J., dissenting in part and concurring in part) ("*Beer*'s dictum suggests that any changes that violate the standard established in *White v. Regester* should not be precleared."). Thus, if Section 5 does reach a change with a nonretrogressive discriminatory purpose, the United States has the burden of establishing that impermissible purpose in a Section 5 proceeding.[10]

Indeed, in *Bossier I*, the United States expressly conceded this point because it was forced to acknowledge that, even under its erroneous construction, *Beer* squarely placed the burden of proving unconstitutional discriminatory purpose on it. Specifically, as the United States' *Bossier I* brief conceded, *Beer* upheld the reapportionment plan at issue because " '*[t]he United States has made no claim*' " that the plan violated the Constitution. U.S. Br. in *Bossier I*, at 43 (quoting 425 U.S. at 142 n.14) (emphasis added by U.S. Brief). Accordingly, the United States conceded that, under *Beer*, the burden to prove a constitutional violation "as a bar to preclearance remains with the *Attorney General*." U.S. Br. in *Bossier I* at 43 (emphasis added).[11] Thus, if appellants are correct that *Beer* authorized

[10] To be sure, the covered jurisdiction has the burden to disprove both the retrogressive purpose and effect prohibited by the plain language of Section 5. But no one argues that the statutory language can be consistently construed to prohibit only a retrogressive effect but simultaneously prohibit a nonretrogressive purpose. Rather, the assertion is that "purpose" must be treated differently than "effect" in order to ensure that Section 5 reaches all unconstitutional voting discrimination. U.S. Br. at 29-31. Since the premise for so construing Section 5 is to maintain consistency with constitutional norms, the burdens of proof should similarly be consistent with the constitutional norm.

[11] In its reply brief, the Solicitor General disingenuously maintains that the United States never conceded in *Bossier I* that it had the burden of proving a constitutional violation, but conceded only that it had the burden of proving a *Section 2* violation. U.S. Reply Br. at 12 n.12. But, in the *Bossier I* brief, the United States accepted the Section 2 burden precisely and only because, under *Beer*, it plainly had the burden to show a

denying preclearance to any discriminatory voting change that violates the Constitution, that opinion also concededly placed the burden on the "Attorney General" to prove such an unconstitutional purpose.

Similarly, the dissenting opinion in *Bossier I*, after concluding that Section 5 preclearance should be denied to changes which offend Section 2, acknowledged that the burden of establishing that Section 2 violation "should rest on the Attorney General" as it would in "any § 2 challenge." *Bossier I*, App. 69a (Stevens, J., dissenting in part and concurring in part). By the same logic, assuming that Section 5 prohibits unconstitutional vote dilution, the burden of establishing that constitutional violation should rest with the Attorney General as it would in any constitutional challenge.

In short, it seems to be universally agreed that if Section 5 is to be extended to encompass voting rights guarantees embodied in "other federal law[s]," there should be a concomitant adjustment to require that the United States prove such a violation, as it would have to in actions brought directly under those "other federal law[s]." *Id.* at 69a-70a.[12] More specifically, those who believe that *Beer* authorized denial of preclearance to constitutional violations (or laws "coextensive with the constitutional standard" as it was understood in 1976) have acknowledged that the burden of proving that *White v. Regester* violation was on the United States. *Id.* at 71a.

Moreover, placing the burden on the United States to show an unconstitutional purpose is consistent with the general rule that "[t]he burden of proving compliance with the Act rests on

constitutional violation. U.S. Br. in *Bossier I*, at 43. Consequently, the United States' argument ran, since it had the constitutional burden and since the 1982 Congress equated constitutional and Section 2 violations, it *also* had the burden under Section 2. Accordingly, the necessary premise of the United States' concession that it had the Section 2 burden was its concession that it had the burden to prove unconstitutional discrimination.

[12] *See, e.g., Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1176 (3d Cir. 1976) ("The burden of proof which usually accompanies the affirmative of the issue . . . should not be shifted merely due to the form of the action.").

the jurisdiction." *Id.* at 68a. The fact that the jurisdiction must disprove retrogressive purpose and effect, by itself, "shift[s] the advantage of time and inertia from the perpetrators of the [alleged] evil to its [alleged] victims" by overriding the normal presumption of legality extended to sovereign state acts and by forcing federal review *prior* to any use of the suspect change. *South Carolina*, 383 U.S. at 328. This advantage is not undone by requiring the United States to prove an unconstitutional purpose in the same manner it would have to in a normal proceeding. If, for whatever reason, a Section 5 proceeding is expanded to include adjudication of an unconstitutional purpose issue that is normally adjudicated in district court, there is no reason that either party should have a different burden than it would have in that typical case. In adjudicating unconstitutional vote discrimination, southern jurisdictions are not second-class citizens who must affirmatively disprove their guilt, but, like northern jurisdictions, are entitled to a strong presumption of constitutionality unless the Justice Department or private plaintiffs can prove otherwise.

That being so, even assuming there is a plausible basis for importing constitutional standards into Section 5, there is nevertheless no basis for also requiring covered jurisdictions to prove their compliance with that exogenous law and to do so would markedly enhance the "novel" and "extraordinary" federalism burden already imposed by Section 5. *Bossier I*, App. 66a (Stevens, J., dissenting in part and concurring in part). Congress tempered the extraordinary procedural burden imposed by Section 5 by limiting the substantive issue to the straightforward and manageable one of whether the change is a regression from the *status quo*. Further requiring a covered jurisdiction to also, in essence, sue itself under the Constitution and disprove the validity of hypothetical alternatives invented by Justice Department lawyers (and then perhaps litigate those same issues *again* in a defensive lawsuit in district court) would disrupt that delicate balance and be contrary to basic federalism principles.

Indeed, particularly since the Justice Department equates "discriminatory purpose" with a failure to maximize the number of majority-minority districts, imposing such a burden

on a covered jurisdiction raises serious constitutional questions about Section 5 itself. *Miller*, 515 U.S. at 925-28. Given this constitutional doubt about the expansive Section 5 envisioned by appellants, their interpretation should not be adopted if the statute can reasonably be construed otherwise – which it obviously can and should be. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988).

Finally, we note that since the only equitable and logical way to import the unconstitutional purpose inquiry into a Section 5 proceeding is to shift the burden of proof to the United States, this is an additional reason for not so expanding the substantive scope of the Section 5 proceeding. This is because, as the United States has also acknowledged, any interpretation of the preclearance proceedings which entails a burden shift cannot practicably be conducted in the Justice Department's Section 5 administrative proceedings. More fundamentally, it is absurd to believe that one lawyer in the Justice Department's Civil Rights Division can carry the burden of disproving the discriminatory purpose alleged by another lawyer, or that the Attorney General could disprove discriminatory purpose to herself. Therefore, all such constitutional issues should be left to the district courts.

Respectfully submitted,

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